Testimony of Brenda Wright
Before the Judiciary Committee's Subcommittee on the Constitution
United States House of Representatives
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Good afternoon, Mr. Chairman and members of the Subcommittee. My name is Brenda Wright. I am the Managing Attorney at the National Voting Rights Institute in Boston, Massachusetts. Prior to that I served as the Director of the Voting Rights Project of the Lawyers' Committee for Civil Rights Under Law here in Washington, where I helped to litigate the *Bossier Parish School Board* case that I am going to discuss today.[1] It is a privilege to appear before this distinguished Subcommittee as it addresses the reauthorization of several provisions of the Voting Rights Act of 1965, an Act whose protections have been critically important in securing full voting rights for all Americans.

I am here today to discuss Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and in particular the need for congressional action to restore Section 5's protections against purposeful racial discrimination in jurisdictions that are subject to the Section 5 preclearance requirement. Those protections were fundamentally weakened by the Supreme Court's January 2000 decision in *Reno v. Bossier Parish School Board*.[2] In that decision, a narrow Supreme Court majority said that the Justice Department must approve certain racially discriminatory voting changes under Section 5, even if the Justice Department determines that the discrimination was intentional. As I will explain, the *Bossier Parish* decision was at odds with Congress' intent in enacting Section 5 and with well-settled precedent.

As you know, Section 5 of the Voting Rights Act requires certain states and political subdivisions with a history of racial discrimination in voting practices to seek approval from the United States Department of Justice or the United States District Court for the District of Columbia before making any changes in their voting laws or practices – a process known as Section 5 preclearance. To obtain preclearance, covered jurisdictions must prove that the proposed change does not have the purpose

[1] *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000).
[2] *Id*.

and will not have the effect of denying or abridging the right to vote on account of race, color or membership in a language minority.[3]

Prior to the *Bossier Parish* decision, it was clear that the "purpose" and "effect" tests of Section 5 were independent; failure to satisfy either one meant that the voting change should not be precleared.[4] The Court's 1976 decision in *Beer v. United States* held that the Section 5 "effects" test required a showing of retrogression, but also made clear that an absence of retrogression would not prevent an objection based on intentional discrimination that would violate the constitution.[5] In *Beer*, the Court examined a proposed legislative redistricting plan for the New Orleans City Council, and held that because the new plan would increase the number of black-majority districts compared to the previous plan, it was not "retrogressive" and could not be found to violate the "effects" test of Section 5. In the same decision, however, the Court made it clear that the "purpose" prong of Section 5 is broader, and that a change reflecting intentional racial discrimination that would violate the Constitution should be denied preclearance even if it is not retrogressive. As the Court said, "[A]n ameliorative new legislative apportionment cannot violate § 5 *unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution.*"[6]

The Court's decision in *City of Richmond v. United States* also made it clear that the test for purposeful discrimination under Section 5 is as broad as the constitutional prohibition against intentional racial discrimination.[7] In *City of Richmond* the Court ruled that a proposed annexation had no unlawful effect under Section 5, but nevertheless remanded the case to the district court to determine if the change had been adopted for a discriminatory purpose. As the Court explained:

> [I]t may be asked how it could be forbidden by § 5 to have the purpose and intent of achieving only what is a perfectly legal result

[3] 42 U.S.C. § 1973c.
[4] *See, e.g.*, *City of Rome v. United States*, 446 U.S. 156, 172 (1980) ("By describing the elements of discriminatory purpose and effect in the conjunctive, Congress plainly intended that a voting practice not be precleared unless *both* discriminatory purpose and effect are absent.") (emphasis in original); *City of Pleasant Grove v. United States*, 479 U.S. 462, 469 (1987) (same).
[5] 425 U.S. 130 (1976).
[6] *Id.* at 141 (emphasis added). *See also id.* at 142 n.14 ("It is possible that a legislative reapportionment could be a substantial improvement over its predecessor . . . and yet nonetheless continue to so discriminate on the basis or race or color as to be unconstitutional.")
[7] 422 U.S. 358 (1975).

> under that section and why we need remand for further proceedings with respect to purpose alone. The answer is plain, and we need not labor it. An official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute.[8]

A case decided 11 years after *Beer* further confirmed that nonretrogressive voting changes must nevertheless be examined to determine if they reflect purposeful racial discrimination. In *City of Pleasant Grove v. United States*,[9] a city whose population was all white sought preclearance for annexations of several white neighborhoods, although the city had refused to annex nearby black neighborhoods. Although the change clearly would not have been retrogressive of the minority's voting rights – since there were no minorities in the city – the Court upheld the Section 5 objection because of clear evidence of racially discriminatory purpose.[10] "To hold otherwise[,]" the Court said, "would make [the city's] extraordinary success in resisting integration thus far a shield for further resistance. Nothing could be further from the purposes of the Voting Rights Act."[11]

For many years, the Justice Department relied on this understanding of the purpose test to deny preclearance to non-retrogressive changes that reflected intentional racial discrimination by a covered jurisdiction. For example, during the 1980s, under Assistant Attorney General William Bradford Reynolds (an appointee of President Ronald Reagan), the Department interposed Section 5 objections to redistricting plans in about 25 counties in Mississippi where there was no retrogression in minority voting strength, but where the evidence showed that the plans were infected by a

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[8] *Id*. at 378.

[9] 479 U.S. 462 (1987).

[10] The language of Section 5, which prohibits changes that "deny[] or abridge[e] the right to vote on account of race or color," tracks the language of the Fifteenth Amendment, which guarantees that "[t]he right of citizens ... to vote shall not be denied or abridged ... on account of race [or] color ....". U.S. Const. Amend. XV sec. 1. This choice of language further evidences Congress' intent that a change that would violate the Fifteenth Amendment also would violate Section 5. The Fifteenth Amendment, of course, clearly reaches more than retrogression; indeed, given the almost complete lack of voting rights enjoyed by blacks in the South when the Fifteenth Amendment was adopted, an anti-retrogression standard would have been virtually meaningless. As the *Bossier Parish* dissenters noted, "[t]he [Fifteenth] Amendment contains no textual limitation on abridgment, and when it was adopted, the newly emancipated citizens would have obtained practically nothing from a mere guarantee that their electoral power would not be further reduced." 528 U.S. at 361 (Souter, J. dissenting).

[11] 479 U.S. at 472.

discriminatory purpose.[12] According to an account by Mark A. Posner, "[t]he concern was that counties were intentionally minimizing minority voting strength by fragmenting minority populations or by packing minority voters into a limited number of majority-minority districts."[13] The Department continued to rely on the purpose prong of Section 5 as an important protection during the 1990s.[14]

The *Bossier Parish* decision changed all this by adopting a new interpretation of the statutory language. In the *Bossier Parish* case, a narrow majority ruled that the intent prong of Section 5 does not outlaw all intentional racial discrimination, but instead covers only "retrogressive intent"[15] -- that is, an intent to make things worse for minority citizens as compared to the *status quo*. Under that narrowed interpretation of the intent prong, a jurisdiction that never had minority representation on its elected body could continue to adopt new redistricting plans intentionally designed to minimize minority voting strength, and Section 5 would provide no protection.

The facts in the *Bossier Parish* case provide a good illustration of that scenario. Bossier Parish is located in the northwest corner of Louisiana, near the border of Texas and Arkansas. In 1990, African Americans constituted approximately 20 percent of the parish's 86,000 residents, yet no African American had ever been elected to the 12-member school board.

The evidence in the case showed that the Bossier Parish school board deliberately sought to keep things that way when it adopted a redistricting plan after the 1990 Census. The school board refused to include any majority black districts in the new plan, even though the school board later stipulated and admitted in court that it was "obvious that a reasonably compact black-majority district could be drawn within Bossier City."[16] There was even testimony that two school board members specifically acknowledged, in private conversations, that the school board's plan

[12] Testimony of Mark A. Posner before the National Commission on the Voting Rights Act, Mid-Atlantic Regional Hearing, October 14, 2005, at 2 (written testimony).
[13] *Id.* Mr. Posner had substantial responsibility for Section 5 matters during his tenure with the Voting Section of the Civil Rights Division, and served as Special Section 5 Counsel from 1992-1995.
[14] *Id.* at 2-3.
[15] *Reno v. Bossier Parish School Board*, 528 U.S. at 326.
[16] *Id.* at 350 (Souter, J., dissenting).

reflected opposition to "black representation" or to a "black-majority district."[17]

The Bossier Parish School Board also had a long history of discrimination against African American citizens in other areas. For example, the parish actively resisted school desegregation long after the historic *Brown* decision. In fact, the School Board stipulated that it had sought for decades to "limit or evade" its obligation to desegregate the parish's schools.[18] As Justice Souter put it in his dissent in the *Bossier Parish* case, "The record illustrates exactly the sort of relentless bad faith on the part of majority-white voters in covered jurisdictions that led to the enactment of § 5."[19]

The Justice Department, in keeping with long-standing precedent, used its authority under Section 5 of the VRA to object to the plan because of the evidence of purposeful racial discrimination. The Parish took the Justice Department to court. The case actually went up to the Supreme Court twice,[20] and in its final opinion the Supreme Court ruled that the Justice Department was powerless to block the school board's plan under Section 5's intent prong, because the plan did not have the "retrogressive purpose" of making things worse than they already were for minority voters.[21] In other words, because the school board had no majority black districts before 1990, its enactment of a plan preserving the all-white school board could not violate Section 5, no matter how blatant the evidence that the plan was motivated by racial discrimination.

The *Bossier Parish* decision greatly weakens the anti-discrimination protections of the Voting Rights Act. To give one important example, if this interpretation had been applied during the first 35 years of Section 5's history, Congressman John Lewis of Georgia probably would not have won election to the U.S. Congress in 1986. After the 1980 Census, Georgia

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[17] *Bossier Parish School Board v. Reno*, 907 F. Supp. 434, 438 n.4 (D.D.C. 1995), *aff'd in part, vacated & remanded in part sub nom. Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997).
[18] *Reno v. Bossier Parish School Board*, 528 U.S. at 349 (Souter, J., dissenting).
[19] *Id.* at 342 (Souter, J., dissenting).
[20] In its first *Bossier Parish* decision, the Supreme Court ruled that the school board's redistricting plan could not be denied preclearance solely on the ground that it would violate the effects test of Section 2. *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997) ("*Bossier Parish I*"). Relying on *Beer*, the *Bossier Parish I* Court held that a dilutive but non-retrogressive effect alone could not give rise to a Section 5 objection, but left open the question whether a showing of retrogression was required when intentional discrimination was present (the question later answered in the second *Bossier Parish* decision).
[21] 528 U.S. at 328-341.

enacted a racially discriminatory congressional redistricting plan that fragmented the black population in the Atlanta area. The Georgia legislator who headed the redistricting committee, Representative Joe Mack Wilson, openly declared his opposition to drawing "n--ger districts."[22]

Because of the clear evidence of racism in the 1980 congressional redistricting process in Georgia, the Justice Department objected to the plan under Section 5, even though the redistricting plan was not retrogressive and did not decrease the minority population in the district. Georgia filed suit, but the District Court for the District of Columbia also refused to grant preclearance, finding that "[t]he Fifth District was drawn to suppress black voting strength."[23] The Supreme Court summarily affirmed that decision. Georgia subsequently redrew its districts to provide a better opportunity for black representation, with the result that Congressman John Lewis was able to win election from a majority-black congressional district in 1986. Under the *Bossier Parish* decision, however, the Department of Justice would have been obliged to approve Georgia's original, discriminatory plan.

The *Bossier Parish* Court's interpretation of Section 5 drains the "purpose" test of any practical meaning in the preclearance process. If a change is retrogressive, there is no need to examine the intent behind the change, because a retrogressive result is sufficient by itself to bar Section 5 preclearance of a proposed change under the "effects" prong. Thus, the only circumstance in which intent can still play an independent role is when a jurisdiction somehow intends to cause retrogression in minority voting strength, but fails to actually bring about a retrogressive result – the case of the so-called "incompetent retrogressor." Such a trivial scope for the "purpose" prong of Section 5 could not have been intended by Congress, which acted with the "firm intention to rid the country of racial discrimination in voting."[24]

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[22] *Busbee v. Smith*, 549 F. Supp. 494, 498 (D.D.C. 1982), *aff'd mem.*, 459 U.S. 1166 (1983). The district court decision reported that Representative Wilson routinely used that racial epithet in referring to blacks. 549 F. Supp. at 500. The court made the somewhat remarkable finding of fact: "Joe Mack Wilson is a racist." *Id.*

[23] *Id.* at 515.

[24] *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966) (footnote omitted).

The *Bossier Parish* decision does not merely conflict with the antidiscrimination principles long followed by our laws. It also has had a serious detrimental impact on Section 5 enforcement.

Before the Bossier Parish decision, Section 5 objections based on racially discriminatory intent were very common. According to a forthcoming study by Peyton McCrary, Christopher Seaman, and Richard Vallely, during the 1980s, 25% of the Department's Section 5 objections were based solely on racially discriminatory intent (83 total objections), and in the 1990s, discriminatory intent accounted for 43% of the objections (151 total objections).[25] These objections were made because minority voting strength was being deliberately minimized to perpetuate past underrepresentation. All together, during those two decades, 234 objections to voting changes were based solely on intent.[26] By contrast, between January 2000 and June 2004, the study found only two objections based solely on intent, showing how little scope remains for the concept of "retrogressive intent" after *Bossier Parish*.[27] In fact, I have examined the objection letters in both those two instances, and I find it difficult to explain either one solely in terms of retrogressive intent.[28]

The sheer reduction in the overall number of Section 5 objections since the *Bossier Parish* decision also suggests that the loss of a meaningful intent standard has substantially reduced the effectiveness of Section 5. In the first four and a half years after the *Bossier Parish* decision, the Department of Justice lodged only 41 total objections under Section 5.[29] In a similar period in the early 1990s, the Department made 250 objections to voting changes.[30] While no one can say for certain how many Section 5

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[25] Peyton McCrary, Christopher Seaman, & Richard Vallely, *The End of Preclearance As We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act,* Table 2 (forthcoming in Michigan Journal of Race & Law) (Appendix 1 to testimony).
[26] *Id.*
[27] *Id.*, Table 4.
[28] In one case, the plan appeared retrogressive in effect. The jurisdiction had reduced the black population percentages in two majority black districts, one by four percentage points and the other by seven, which the Department's objection letter appeared to treat as significant reductions in black voting strength. Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to C. Havird Jones, Jr., Senior Assistant Attorney General, September 3, 2002 (File Number 2002-2379). In the other, the Department denied preclearance to a proposed annexation that would have added two white residents to the town, citing evidence that the town had refused to annex black neighborhoods. While the intent does appear discriminatory, it is hard to see the intent as retrogressive of existing black voting strength. Letter from R. Alexander Acosta, Assistant Attorney General, to Hon. H. Bruce Buckheister, September 16, 2003 (File Nos. 2002-07-12 and 2002-08-09).
[29] *Id.*
[30] *Id.* at 68.

objections would have been lodged without the *Bossier Parish* decision, that huge disparity certainly suggests that the decision has had a major impact.

All of this underscores the importance of going back to the original intent of Section 5 when Congress reauthorizes it. When a jurisdiction deliberately tries to lock minorities out of electoral power, that jurisdiction should not be entitled to Section 5 preclearance simply because minorities always have been discriminated against in the jurisdiction.[31] Such a result is fundamentally inconsistent with our nation's values.

Therefore, when Congress reauthorizes Section 5, Congress should act to restore the original scope of Section 5's prohibition on intentional discrimination. Congress should make it clear that preclearance should be denied if a change has a racially discriminatory purpose, whether or not the purpose is retrogressive.

Thank you for the opportunity to testify here today.

[31] As Justice Souter said in dissent in *Bossier*, "the preclearance requirement was not enacted to authorize covered jurisdictions to pour old poison into new bottles." 528 U.S. at 366.